Jan. 29, 1759.

INFORMATION

FOR

John Grieve, *Servant to Doctor* George Grieve, *Physician in* Peebles, *Pursuer*,

AGAINST

John Williamson Cordner in *Peebles*, Defender.

JAMES WILLIAMSON of *Cardrona*, of this Date, " For " Love and Favour, and other Causes, disponed to Mr. " *John Williamson*, then Schoolmaster, and afterwards " Provost of *Peebles*, and the Heirs-male, lawfully pro- " create, or to be procreate of his Body, or the Heirs-male " of the Descendants of his Body; all which failing, to re- " turn to the Laird of *Cardrona* his Heirs, five Acres of Land " in the *Kirklands of Peebles*, Houses, *&c.*" 27 April, 1706.

The Acres of Land held of the Earl of *Traquair*, and the said Mr. *John Williamson*, without taking any Infeftment upon the above Disposition, applied to the Earl of *Traquair*, the Superior, and obtained from him a Charter, of this Date, by which, the said Earl, " for a certain Sum of Money paid to him, as " Superior of the Lands (therein) underwritten, by Mr. " *John Williamson*, for himself, and *James Williamson*, his el- " dest lawful Son, ratifies and approves to the said Mr. *John* " *Williamson* in Liferent, and to the said *James William-* " *son*, his Son, in Fee, heritably and irredeemably, a certain " Disposition, made and granted by the deceased *James Wil-* 6 Octob. 1709.

" *liamſou* of *Cardona*, in favours of the ſaid Mr. *John William-*
" *ſon*, and the Heirs-male of his Body, lawfully procreate, or
" to be procreate, dated the 27th *April*, 1706, by which
" the ſaid *James Williamſon* ſold and diſponed, to and in fa-
" vours of the ſaid Mr. *John Williamſon*, and the Heirs-male
" of his Body, lawfully procreate, or to be procreate, under
" the Proviſion therein mentioned, all and haill, *&c.*" reci-
ting the Lands as contained in the Diſpoſition.

The Sequel of the Clauſe of Confirmation is in the uſual Stile. Then follows a Clauſe, of the Nature of a *Novodamus:* " For
" the Cauſes above written, ſelling, granting, and diſponing,
" *titulo oneroſo*, to the before named Mr. *John Williamſon* in
" Liferent, and the ſaid *James Williamſon*, his Son, in Fee,
" the above mentioned five Acres of Land, *&c.*"

9 Decem. 1709. Seaſine is taken, of this Date, upon the above Charters, and the Seaſine bears: *Quod comparuit magiſter Joannes Williamſon, præceptor in Peebles, & Jacobi Williamſon, ejus filii habens, ſuiſque in manibus tenens quamquidem cartam, &c. Quamquidem cartam præfatus magiſter Joannes Williamſon præſentavit & deliberavit dict. Alexandro Horsbrugh, balivo in hac parte antedict. eum humiliter requiren. ut ad executionem dict. officii balivatus per præceptum ſaſinæ ſubinſert. inibi content. ſibi commiſſi debite procederet, &c.* The Clauſe of Delivery is in theſe Terms: *Quod balivus ſtatum, ſaſinam hereditarie, pariter poſſeſſionem actualem & corporalem, memorato* magiſtro Joanni Williamſon, in vitali reditu, & dict. Jacobo Williamſon, ejus filio in feodo, *ſub proviſiones ſupra mentionat. per terræ & lapidis fundi dict. terrarum*, in eorum manibus, *reſpective & ſucceſſive, ut moris eſt, ſecundum formam & tenorem antedict. cartæ, præceptique ſaſinæ, in omnibus punctis, traditionem & deliberationem, dedit, tradidit, & deliberavit; ſuper quibus omnibus & ſingulis præfatus magiſter Joannes Williamſon, pro ſemetipſo, & in nomine ejus filii, inſtrumentum petiit, &c.* The Seaſine is duly recorded.

Alexander Williamſon, Sheriff-clerk in *Peebles*, is the Writer of

of the Diſpoſition and of the Charter, and is Notary to the Seaſine above mentioned.

Down from the Date of the Seaſine, till the Year 1734, Mr. *John Williamſon*, the Father, and the aforeſaid *James*, his eldeſt Son, continued in Life together, without either of them attempting any Innovation or Alteration, upon the State of the above Titles. *James*, the Son, died that Year, leaving no Iſſue, and the Father ſurvived him, till within theſe two or three Years; but it would appear, that after the Death of *James*, the Son, his ſecond, and ſurviving Brother, *John*, (Defender in this Proceſs) in order to diſappoint his Brother *James*'s Creditors, whereof this Purſuer, then a ſubſtantial Tenant, though now reduced in his Circumſtances, was one, bethought himſelf of unhinging the aforeſaid Charter and Seaſine, which his Father had, thirty Years before, taken and poſſeſſed under, all that while, as his and his eldeſt Son's Title to the Lands, for their reſpective Intereſts of Liferent and Fee; and accordingly, of this Date, Mr. *John Williamſon*, the Father, is induced to execute a Diſpoſition of the Lands to his ſurviving Son, *John*, and by which he is made to convey *Cardrona*'s Diſpoſition, which is fully therein narrated, with the Procuratory and Precept, contained in it, as unexecuted. The Diſpoſition is for Love and Affection, and to give the Innovation thereby projected, the greater Colour of Merit, the Deſtination is pretty much in the ſame Terms with thoſe of *Cardrona*'s Diſpoſition, being to *John* and the Heirs-male, procreate or to be procreate of his Body; which failing, to the Heirs-male of the Deſcendants of his Body; which failing, to any other Heirs-male, procreate or to be procreate of the Diſponer, the Father's own Body; which failing, to the Heirs-male of the Deſcendants of the Diſponer's own Body; all which failing, to return to the Laird of *Cardrona*, and his Heirs. March 29, 1736.

But after executing the ſaid Diſpoſition, a new Seaſine was taken,

May 8th, 1736. taken, of this Date, by Mr. *John Williamſon*, the Father, upon *Cardrona*'s Diſpoſition. And

Thereafter, Mr. *John Williamſon* raiſed a Reduction of the Charter, granted by the Earl of *Traquair*, and Seaſine thereon, upon this Ground, that the ſame were diſconform to *Cardrona*'s Diſpoſition; and the Earl of *Traquair* being the only Perſon called as a Defender, a Decreet of Reduction, of this Jan. 18th, 1737. Date, was obtained in Abſence.

What ſeems to have brought on theſe Proceedings, was the preſent Purſuer's leading Diligence againſt the Lands, as a Creditor of the eldeſt Son, *James Williamſon*, who had apparently died in the Fee thereof.

For he brought a Proceſs in this Court, againſt *John Williamſon*, the preſent Defender, as lawfully charged to enter Jan. 9th. 1736. Heir to his Brother *James*, and of this Date, obtained a Decreet, *cognitionis cauſa*, upon *John*'s Renunciation, and thereafter proceeded to deduce an Adjudication, in which Compearance was made for Mr. *John Williamſon*, the Father, after a Decreet had been pronounced, and a Petition given in by him to the whole Lords, in Abſence of the Lord-Pronouncer of the Decreet of Adjudication; in which Petition it was contended, that the Creditors of his Son *James*, had no Intereſt in the Lands, he, the Father, being the abſolute Fiar thereof. This Petition was remitted to another Ordinary, before whom a Debate enſued; but neither *Cardrona*'s Diſpoſition, nor any thing elſe being produced to ſupport the Grounds of the Petition to the Lords, Decreet of Adjudication was of new July 13th, 1736. pronounced, of this Date.

The now Purſuer, Obtainer of the Adjudication, proceeded to purſue a Mails and Duties upon the ſame, on which Jan. 28th, 1738. Decreet was, of this Date, pronounced.

But this was certainly erroneous, as Mr. *John Williamſon*, the Father, and who at any Rate was Liferenter of the Subject, was then, and for Years thereafter, in Life.

Here

Here the Matter reſted, till of late, that the Purſuer, *John Grieve*, brought a freſh Proceſs of Mails and Duties, againſt *John Williamſon* and others, as Poſſeſſors of the Lands, upon his Decreet of Adjudication, *cognitionis cauſa*, obtained in the 1736.

The Cauſe came before the Lord Juſtice Clerk, and *John Williamſon* has appeared to the Suit, and produced the aforeſaid Diſpoſition by *Cardrona*, *anno* 1706, with the Seaſine thereon taken, in name of his Father Mr. *John*, 8th *May* 1736, with his Father's Diſpoſition to him, dated 26th *March* 1736, together with the aforeſaid Decreet of Reduction of the Charter and Seaſine 1709, taken in Abſence, againſt the Earl of *Traquair*, upon the 18th of *January* 1737, upon which Titles he founds, as ſufficient to exclude the Purſuer, and the Debate having turned upon the Point of Law, Whether *James Williamſon*, the eldeſt Son, was truly Fiar, in virtue of the Charter and Seaſine before recited, ſo as to let in the Purſuer upon his Diligence, as a Creditor to him? The Lord Ordinary has taken the Cauſe to report, and appointed Informations. This is humbly offered on the Part of the Purſuer.

And, in the *firſt place*, to diſembarraſs the Caſe of what is not material to the Iſſue, it was obſerved for the Purſuer, that the Decreet of Reduction obtained by Mr. *John Williamſon* againſt the Earl of *Traquair*, as the ſole Defender called, could have no Operation to the Prejudice of any other than the ſaid Earl, and conſequently could not affect the Right that ſtood in *James Williamſon*, or cut off the Intereſt of his Creditors, or any claiming under him: And this can admit of no Argument.

2*dly*, It ſeems to be equally clear, that, in ſo far as Mr. *John Williamſon* had, by any habile Act or Deed of his own, given, or concurred in veſting in his Son *James*, a better Right than he otherwiſe might have had, he could not, by any after Device, retract or annul what he had done, or impair the *jus quæſitum* which *James*, and, conſequently, his Creditors

ditors contracting with him, had acquired; and therefore the Reduction purſued by Mr. *John Williamſon*, or his taking a new Seaſine upon *Cardrona*'s Diſpoſition in the 1736, or diſponing the Lands to his Son *John*, can take no Effect prejudicial to the Right or Intereſt formerly given to *James*, ſuppoſing it well and properly eſtabliſhed. Nor,

3*tio*, Can it well be diſputed, that, ſo far as the Faith of the Records go, the Creditors of *James* are intitled to avail themſelves of a *bona fides* in contracting with him who ſtood infeft in the Fee of the Lands, and to plead every thing in ſupport of their own Claim upon the Lands, whether againſt Mr. *John* the Father, or any deriving under him by Succeſſion, or ſingular Titles, that *James* himſelf could have founded upon for protecting the Fee, once eſtabliſhed in his Perſon.

And a *bona fides*, well founded, may be good to ſupport the Intereſt of a Creditor contracting under it, even after their Debitor's Right to the Eſtate is reſolved, notwithſtanding the Effect of the Rule, *reſoluto jure dantis*, &c. So it has been determined, particularly in the Caſe of Mrs. *Stewart* of *Phiſgil*.

It was farther mentioned for the Purſuer, that the Earl of *Traquair*'s Charter, containing an effectual Grant of *Novodamus*, with the Infeftment following upon it, may be conſidered as a proper and valid Conveyance of the Property of the Lands to *James Williamſon*, according to the feudal Notions which ſuppoſe the *dominium* to be in the Superior, as it certainly is in every Queſtion with the whole World, excepting a Vaſſal duly veſted in what is called the *dominium utile*, by proper Grant from the Superior himſelf, or others who can plead under ſuch Grant. And there can be no Doubt, that a Charter and Seaſine from one having a much worſe Title than the true Superior, is a good Right of Property, and will be abſolutely ſo to all Effects, when confirmed by

by length of Time, were it exceptionable in its firſt Conſtitution.

But not to inſiſt longer upon Matters which the Merits of this Caſe, upon its own Circumſtances, need not the Aid of, the Purſuer hopes it may be aſſumed as an uncontrovertible Principle, that the Conſent of a Proprietor, or Perſon intitled to a Right, declared in a proper and legal Manner, will be good to validate a Conveyance of that Right, granted by another Perſon, who has not the Right in him. Thus a Diſpoſition by one who is not Proprietor, if executed with the Conſent of the Proprietor, makes a good Title, as much as if the real Proprietor were the formal Diſponer. And there is ſufficient Warrant for advancing this Step farther, that a Writing or Subſcription of a Party, is not the only Method in which an effectual Conſent may be adhibited or expreſſed. It may be done as clearly, and with equal Strength, *rebus & factis*, as *verbis aut ſcriptura*.

To apply theſe Things to the Caſe in hand, what the Purſuer has humbly contended is, that ſuppoſing the Fee of the Lands in queſtion was given to Mr. *John Williamſon* by *Cardrona*'s Diſpoſition, yet it was in his Power to denude himſelf of that Fee whenever he pleaſed, in favours of his eldeſt Son *James*, and that, in Fact, he did ſo, by his Concurrence, and Co-operation with the Deed of the Superior in the Charter, which he took from the Earl of *Traquair*, and the Infeftment following thereon, whereby, beyond all Ambiguity, the Fee was veſted in *James*.

And the Purſuer apprehends, that had either the Charter, or the Seaſine upon it, been ſubſcribed by Mr. *John Williamſon*, there had not been Place for a Doubt. The Queſtion then comes, whether there are Circumſtances ſufficient to have the ſame Effect with ſuch a Subſcription, as probative of the Father's Conſent to the proper Deed of the Superior, and his own actual Intention that his Son ſhould be ſubſtituted

in

in the Fee in place of himſelf, and his own Intereſt limited to a Liferent?

What the Purſuer founds upon to this Purpoſe, is, in the firſt Place, that it muſt have been the Act and Deed of Mr. *John Williamſon*, the Father, to apply to the Earl of *Traquair*, the Superior, for a Charter, in Terms of the one granted. Your Lordſhips ſee, the Charter not only bears a Relation to the Diſpoſition by *Cardrona*, but fully recapitulates it, and expreſly confirms it. It was that Diſpoſition which was the Foundation and Cauſe of the Charter; and as the Tenor of it is indiſputable Evidence, that it was framed and granted, not of the proper Motion of the Superior, or by his Directions; ſo it could not poſſibly have been given at all, or conceived in ſuch Terms, but by the Direction of Mr. *John Williamſon*. No other Perſon was poſſeſſed of the Diſpoſition, which is the moſt material Part of the Compoſition of the Charter, nor could any apply for it but he. It muſt appear therefore in the ſame Light with a Thing which frequently happens. A Perſon purchaſes Lands or other Subjects, with his own Money, but takes the Rights and Conveyances, not in his own Name, or to himſelf ſimply, but to his Son, or to himſelf in Liferent, and to his Son in Fee. That is formally the Deed of the Seller, but the Law holds and interprets it to be the Act of the Perſon who pays for, and procures the Right. And, for the ſame Reaſon, it muſt appear, that, though the Earl of *Traquair* is the Perſon who ſubſcribes the Charter, the Terms in which it is granted are, and could only be the Act and Operation of Mr. *John Williamſon*, the ſole Perſon who applied for, and obtained it. This the Purſuer ſhall readily admit is Evidence that might be redargued by any Act of Repudiation, or Refuſal to accept of the Charter in ſuch Terms; but ſtill it is the firſt Link in the Chain, and as it is in itſelf ſtrong, ſo it gathers full Force when it is conſidered.

2*dly*,

2*dly*, That ſo far from rejecting or repudiating the Charter, there is the directeſt Evidence of Mr. *John Williamſon*'s Acceptance of it; not only by his taking Infeftment upon it, but poſſeſſing under that as his Title near 30 Years, without attempting any Innovation. Nor does it reſt here, for,

3*tio*, Your Lordſhips have obſerved that the taking of the Seaſine is the direct and immediate Act of Mr. *John Williamſon* himſelf. It is a Seaſine *propriis manibus* of him. It bears, that he appeared and produced the Charter, requiring Infeftment to be given upon it; and not only ſo, but his Son *James* is with him, who had no other Intereſt, but by virtue of the Charter, in that particular Seaſine at leaſt; and the Livery of Seaſine is to Mr. *John Williamſon* and his Son, *James*, by Delivery of the Symbols in *their own Hands, reſpective & ſucceſſive;* and Mr. *John* takes the Inſtrument thereon for himſelf, and in name of his Son. There does appear an Inaccuracy, or bad Conſtruction of the *Latin* in the Initials of the Seaſine, where it is ſaid, *Comparuit magiſter Joannes Williamſon, &* Jacobi *Williamſon, ejus filii*, which looks as if it had been meant, that he appeared for himſelf, and in name of his Son, though the copulative Words are left out; but if it had been ſo, it would have been equally ſtrong to ſhow that the Father was knowingly and deſignedly acting for Behoof of his Son, and that the Infeftment, as well as the Charter in the Son's favours proceeded by the Father's Deſire and Direction. However, from the laſt Clauſe it is clear, that the Son was preſent with the Father, and received the Symbols of Infeftment, at the ſame Time with him; and as that could not be but upon the Footing of the Father's Knowledge and Conſent both to Charter and Seaſine, it is abundant Proof of more than his Ratihabition and Approbation. It proves the Charter, ſo far as it is in favours of his Son, to have been his own Deed, and Operation.

It was ſaid, and it is true, that a Seaſine is but the Aſſertion of a Notary, and probative of nothing but the official

Execution of the Inſtrument, and the Purſuer does not plead that the Aſſertion of a Notary in a Seaſine can ſupply the Warrant of it, as in the Caſe of a Seaſine given *propriis manibus*, without the Granter's Subſcription.

But as a Seaſine is not even barely the Aſſertion of a Notary, being alſo the Aſſertion of the ſubſcribing Witneſſes, ſo it is, and is the only legal Proof of the Fact of a Seaſine being taken, and that neceſſarily includes its being a Proof of all the conſtituent Parts of the Eſſence of the Seaſine; for Example, that ſuch a one as *Baillie* gave, and that ſuch another received the Symbols of Infeftment; and the Purſuer deſires no more in this Caſe, than that the Inſtrument of Seaſine atteſted by the Notary and Witneſſes, be ſuſtained as good Evidence, that Mr. *John Williamſon* himſelf produced the Charter, deſiring Infeftment to be given according to the Tenor of it, and did accordingly, jointly with his Son, receive and accept the Symbols of Infeftment by virtue of that Charter, and according to the Form and Tenor of it. From which Fact, it is ſubmitted, there is ſufficient Proof of the Point in Iſſue, that Mr. *John Williamſon* conſented to the Charter and Seaſine as they ſtand, by which the Fee is veſted in his Son *James*.

Add to all theſe the material Circumſtances of Mr. *John Williamſon*'s retaining in his Poſſeſſion the Charter and Seaſine thus executed, and contenting himſelf with enjoying the Lands under the Title of a Liferent, without Quarrel, for near 30 Years, his cauſing the Seaſine to be recorded; and this other, which, though a ſmall Circumſtance, ſtill throws a Grain into the Scale, that one Perſon, and who, by his Name, appears to have been a Friend, is the Writer of *Cardrona*'s Diſpoſition, and the Writer of the Charter by the Earl of *Traquair*, and the to Notary the Seaſine thereon. From which it would appear, that the whole Deeds were of one and the ſame Contexture, and the Charter and Seaſine, particularly, of the Direction and Appointment of Mr. *John Williamſon*

ſon himſelf; and that it was all Deſign, and no Miſtake or Impoſition upon him. Theſe things all joined together, do, with great Submiſſion, put it beyond Controverſy, that Mr. *John Williamſon* conſented to the Charter and Infeftment as much as if he had ſubſcribed either or both of them with his own Hand.

There are Caſes which occur among the Deciſions, which might, with Propriety enough be adduced in Support of the Purſuer's Plea as above explained; but there is one ſo appoſite as to render it unneceſſary to ranſack many Volumes in queſt of Authorities. It cannot be reported from a better Authority than the printed Papers in the noted Cauſe betwixt Lord *Hope* and the Marquis of *Anandale*; in the Words of which it ſhall be quoted.

The Information for Lord *Hope*, dated 4th *January* 1733, and drawn by a Reverend Judge, whom we have yet the Happineſs to enjoy, proceeds thus, (*p.* 18.) " The Lords are " intreated to call to mind a recent Deciſion in *December* " 1724 between *John Cubbiſon* of *Blackrigs*, and *John Cubbiſon* " of *Cullenoch*. The Fact ſtood thus: *John Cubbiſon* of *Calle-* " *noch* purchaſed from Sir *William Gordon* of *Aſton*, a Parcel of " Lands, to be held of the Seller, which the Superior diſponed to " him, his Heirs and Aſſignees whatſoever, and the Diſpoſi- " tion had an Obligement ingroſſed, to deliver a Charter, " containing a Precept of Seaſine, to him and his fore- " ſaids."

" The ſaid *John Cubbiſon* afterwards took a Charter from " the Superior to himſelf in Liferent, and his ſecond Son in " Fee, whereupon Infeftment was taken, and at ſome Diſtance " of Time, thinking fit to purſue a Reduction of this Char- " ter and Seaſine, he urged, as a Reaſon of Reduction, that, " by the original Diſpoſition, he was Fiar of the Eſtate; that " the Charter granted by the Superior had no Warrant; and " therefore ought to be reduced."

It

" It was anſwered for the Son, That, in the Seaſine, the " Father is narrated to have received the Symbols of the In- " feſtment, as Attorney for the Son. 2*dly*, That, in a Bond, " granted by the Father, the Son was deſigned by the Lands " contained in the Charter; and the Lords, upon a Report " in Preſence, found, that the Charter and Seaſine, without " any Warrant, joined with the Circumſtances above men- " tioned, were ſufficient to eſtabliſh the Fee in the Son; and, " after reviewing the Caſe, upon a Petition and Anſwers, ad- " hered to their Interlocutor." The learned and honourable Drawer of the Information goes on to argue, as follows:

" In that Caſe, the Fee was clearly eſtabliſhed in the Per- " ſon of the Father, by the original Diſpoſition, though the " real Right was not compleated by Infeftment taken, and " and it could not paſs from him, without his Conſent " legally given. What was the Proof of this Conſent, " which the Lords thought neceſſary? The Aſſertion of a " Notary in the Seaſine that the Father appeared, as Procu- " rator for the Son, when the Infeftment was taken, and " that the Father had ſigned a Bond with the Son, wherein " he was deſigned by the Lands in the Charter, and from " theſe Documents, it was preſumed and adjudged, that the " Father conſented to every Clauſe in the Charter, whereon " the Father was caſt, and the Charter and Seaſine ſuſtained " as a ſufficient Right to the Son, without any Warrant what- " ſoever."

This Argument applies the Deciſion ſo forcibly to the preſent Caſe, that to pretend to add any thing to it upon this Occaſion, would not be decent. But as the Anſwer to that Deciſion, when pled as a Precedent in that Cauſe, made by the great Lawyer, that ſince filled the Chair, who draws the Information upon the other Side, affords, in his Acknowledgment of the Principles, an Authority of itſelf, in Point to the preſent Queſtion, it will not offend your Lordſhips to tranſcribe his own Words. He argues thus, Bottom of Page 17th of the additional Information

mation for the Marquis of *Annandale*, " The Charter to young " *Cubbiſon* was an original Charter, eſtabliſhing a full Fee, and " whatever was in *Gordon*'s Obligation, *that* might be inno- " vated by the Conſent of him and *Cubbiſon*, elder, No- " thing hindered the Father to take the Charter to the Son, " if he pleaſed: Accordingly he did ſo. It appears by his be- " ing the Perſon, who took the Symbols, as Attorney for his " Son, he had taken the Charter in Implement of *Gordon*'s Ob- " ligation; and this, your Lordſhips found, bound him: But " this it could never have done, if the Father had once " been infeft upon the Diſpoſition."

The Purſuer need only ſubſume, in the Words of the laſt made Quotation, that Mr. *John Williamſon*, by taking the Charter and Infeftment, now before your Lordſhips, in the Manner he did, bound himſelf in like Manner as *Cubbiſon* the elder did; and that he could not alter or deſtroy that Right of Fee of his own Creation, which was veſted in his Son *James*; and conſequently, that in vain did he attempt it, by taking a new Infeftment or reducing the old, by an eluſory Action brought againſt an improper Party; and that the Diſpoſition to his Son *John*, the preſent Defender, being what he had no Power to give, what he had by his prior Deeds, tied himſelf up from granting, it could be of no Avail to take the Fee out of *James*, or out of his *hereditas jacens*; and, as the Purſuer has habily affected it by his Adjudication of the *hereditas jacens* of *James*, he falls to be preferred to the Mails and Duties in the preſent Competition.

Theſe Principles are again inſiſted upon, and the Deciſion of *Cubbiſon*, pled in Support of them in another Paper, in the Reduction that was purſued between theſe two great Parties, after the Proceſs of proving the Tenor was determined, the following Paragraph to that Purpoſe occurs in the Petition for Lord *Hope*, dated 12th *February*, 1735, *p.* 15. the Words of which will be familiar to ſome of your Lordſhips, " That " though the moſt common Method of diveſting the former

" Vaſſal, is by a Procuratory of Reſignation; yet neither any " Law, nor the Nature of the Thing has required any ſuch " Procuratory, as a neceſſary Solemnity for diveſting the for- " mer Vaſſal, or for excluding from challenging the new In- " feſtment. If the Vaſſal can impower a Procuratory to re- " ſign, it is, with Submiſſion, thought, he may do the ſame " Thing by himſelf. Has he not the ſame Power himſelf, " that he can give to a Procurator? Yea farther, where is " the Law, that excludes the Vaſſal from taking a new Infeft- " ment of his Eſtate, without a ſigned Procuratory? Or what " good Reaſon can be aſſigned for ſuch a Law, if his Conſent " to ſuch new Infeftment, granted in favours of himſelf, is re- " ſtricted *rebus & factis?* Ought not this to debar the Vaſſal, " and all claiming under him, from quarrelling the Infeft- " ment? And ſo it was adjudged by your Lordſhips, after a " moſt litigious Debate, in the Caſe, *Cubbiſon* contra *Cubbiſon*, " *November* 1724, where the Father having purchaſed Lands, " and taken the Diſpoſition in his own favours; thereafter " the Superior granted a Charter to the Son in Fee, and to " the Father in Liferent; the Father having thereafter brought " a Reduction of his Son's Right, it was there pleaded for the " Father, That the Son's Infefment was null, as being with- " out a Warrant. It was anſwered for the Son, That the " Charter and Seaſine eſtabliſhed a complete feudal Right in " the Son without farther; and that the Father was excluded " from challenging the Infeftment, becauſe he had homolo- " gate the ſame. Firſt, by accepting of the Symbols from " the Notar for himſelf, and as Attorney for his Son. And, " 2dly, that the Father joined in a Bond with the Son, where- " in the Son was deſigned as Proprietor of the Lands. Thoſe " Circumſtances your Lordſhips found ſufficient to bar the Fa- " ther from challenging the Son's Infeftment."

The Purſuer, if much better aſſiſted than he is, could not have uſed Words more fit, to illuſtrate or ſupport his Plea, than thoſe he has taken the liberty to borrow from the Pens

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of ſo eminent a Triumvirate in the Law, and may ſafely reſt this Part of the Argument upon what has been offered.

It was farther mentioned for the Purſuer, That it did not appear with any great Clearneſs, that there was a Deviation or Diſconformity between the Diſpoſition by *Cardrona*, and the Charter and Infeftment flowing from Lord *Traquair*. The Diſpoſition, it is true, is to Mr. *John Williamſon*, and the Heirs-male of his Body, and the Heirs-male of the Deſcendants of his Body. What has been intended by the Deſcendants of his Body, in diſtinction from his Heirs-male, when no Females are mentioned, is not very clear; nor is it any thing to the preſent Queſtion; but the Purſuer would humbly beg leave to doubt, if it is quite ſo certain, that Mr. *John* was by the Conception of theſe Words, an abſolute Fiar, upon the Footing of *Cardrona*'s Diſpoſition.

The Lands are not indeed given to him in Liferent; but neither is the Word, *Fee*, uſed in oppoſition thereto.

It is a Diſpoſition for Love and Favour, and it ſeems to have been with ſome ſpecial View, that the diſpoſitive Words are to him and his Heirs-male in a copulative Form; and upon the Conſtruction of them, as they ſtand, it is at leaſt equally uncertain, whether the common Words, *in Fee*, which are omitted, have been left out (if *per incuriam*) *before*, or *after* the Introduction of the Heirs-male: And ſuppoſing in a Queſtion with Mr. *John* himſelf, or his Creditors, and his eldeſt Son, he might have been found to be the Fiar; there are not wanting Caſes, where, upon Deeds of this Nature, your Lordſhips have conſtrued ſuch a Fee in a Father to be of a fiduciary Kind, which could not be evacuated by him, to the Prejudice of an Heir or Child, apparently joined with him in the Conſtitution of the Fee.

But, without arguing what is not neceſſary, this much at leaſt, the Conduct of Mr. *John Williamſon*, in taking, as it is clear he did, the Charter confirming this very Diſpoſition to himſelf *in Liferent*, and to his eldeſt Son, who was Heir-male of his Body, *in Fee*, proves that he imagined his Son had ſome more immediate and direct Intereſt in the Subject,

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by virtue of *Cardrona*'s Diſpoſition, than a mere Hope of Succeſſion, and that he was willing *ab initio* to ſecure his Son in the Fee of the Lands, reſting ſatisfied with a Liferent, which was probably all the Donor intended for him. And as there is ſuch Evidence of the Senſe and Intention of the Parties, your Lordſhips will, with the leſs Reluctance, give way to Acts and Deeds, which the Law ſcruples not to make effectual for that Purpoſe.

It was objected on the Part of the Defender, that the Clauſe of Return, in favours of the Laird of *Cardrona* and his Heirs, was good to ſecure againſt all gratuitous Deeds of the intermediate Fiars, as eſtabliſhing a Sort of *fidei-commiſſ.* in favours of the Donor's ultimate Deſtination. The Clauſe of Return is ſuch as perhaps it might be difficult to carry into effectual Execution; but be that as it will, the Objection muſt appear to your Lordſhips to have no Weight.

Even a Tailzie itſelf cannot be conſtrued to bar a Tenant-entail from giving a *præceptio*, either in whole or in part, to the apparent Heir of Tailzie. That can have no Effect prejudicial to the ſubſequent or final Deſtination. It is no more than the Poſſeſſor withdrawing himſelf a little ſooner than naturally might be the Caſe, and if he is pleaſed ſo to do, no body elſe need, or can find fault. Mr. *John Williamſon*, when he conſented to the putting of the Fee in his eldeſt Son, or rather did it himſelf, did no more than what this very Defender, when he came to be in that State, induced him to do in his Favours, with a much more unjuſtifiable View, of diſappointing his Brother's Creditors, by the Diſpoſition now produced and founded on, granted in the Eve of the Father's Life. And as the Fee was once fairly and properly veſted in the eldeſt Son *James*, with the full Conſent of his Father, it is hoped your Lordſhips will have no Difficulty to find it remained with him at his Death, and cannot now be evicted from his *hereditas jacens* by this Defender, in Competition with the Purſuer, under the Pretence of the Deeds now ſet up as an excluſive Title.

In reſpect whereof, &c.

R. MACKINTOSH.